

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

- - - - -
Nos. 18,439, 18,526
- - - - -

ALFRED E. WARREN,
APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

962

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

OF COUNSEL:

LAWRENCE J. BERNARD, JR.

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTION PRESENTED

Whether, in a criminal case, where substantial and uncontroverted allegations indicated that appellant might have been suffering from mental illness both when he entered his plea of guilty and at the time of the alleged crime, the District Court erred in denying appellant's motion to withdraw his plea of guilty and vacate the sentence entered thereon without first ordering that he be given a mental examination.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,439, 18,526

ALFRED E. WARREN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The appeal in No. 18,439 is from an order of the District Court entered on February 14, 1964, denying three post-sentence motions filed by appellant, namely, his motion to withdraw his plea of guilty and to vacate the sentence imposed thereon; for reduction of sentence; and for a mental examination. On February 18, 1964, appellant filed an application for leave to appeal without prepayment of costs from the denial of his three motions, and, on the same date, the District Court granted his application. The appeal in No. 18, 526 is from a judgment and commitment of the District Court dated August 16, 1963, and filed August 21, 1963, by which appellant was convicted of robbery (822-2901, D.C. Code (1961)) and sentenced to a term of imprisonment. On August

29, 1963, appellant filed an application for leave to appeal from this judgment without prepayment of costs. His application was denied by the District Court on August 30th. By an order dated April 7, 1964, this Court granted appellant leave to appeal from the judgment and commitment without prepayment of costs and, sua sponte, ordered that this appeal be consolidated with No. 18,439. The District Court had jurisdiction under §§11-305, 11-306, D.C. Code (1961), and this Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE CASE

Appellant, a 19 year-old youth, was indicted on April 22, 1963, with three others, for housebreaking and robbery (§§22-1801, 22-2901, D.C. Code (1961)). The crimes were alleged to have occurred on March 2, 1963, at the apartment of one Daniel Pittman.

On June 6, 1963, appellant, represented by counsel appointed by the District Court, entered a plea of guilty to the robbery count of the indictment. The District Court, on August 16, 1963, sentenced him to a term of imprisonment of from four (4) to twelve (12) years.

On or about September 16, 1963, appellant filed in the District Court a pro se motion addressed to Chief Judge McGuire, in which he requested that he be examined by a psychiatrist, stating in part:

"I think that I am incapable of controlling my mental conditions, I am not capable of realizing some of the things that I do and I would like to be examined at this time because I believe that my mental condition is due to my past childhood. At times I believe that I have no control over the things that I do. I have a complex that I cannot control. * * * I have had a confused childhood and I cannot seem to find myself."

Chief Judge McGuire referred this motion to Judge Jones, who had sentenced appellant. Judge Jones chose to treat appellant's motion as a motion under Rule 32(d), F.R. Crim. P., 18 U.S.C., to withdraw his plea of guilty and to vacate the sentence entered thereon,^{1/} and he appointed new counsel to represent appellant in connection with his motion.

On December 30, 1963, appellant, through his court-appointed counsel, filed a motion for reduction of sentence and, in conjunction therewith, a motion for mental examination. The latter motion contained the following allegations:

2. Since sentencing the defendant has indicated to counsel that he "broods" for long hours, is subject to days of depression and has fantasies "very often" of whipping people who in his life "have been against him." He has experienced these reactions for some years.
3. In addition the defendant indicates to defense counsel that as a child he would continually run away from home, would wander the street at night and would be unable to make friends at school.
4. He further relates certain instances of possible paranoid content describing instances of "people making fun of him," of his foster parents "being against him" and of one foster mother locking him in his room for "months at a time" each day after school. Counsel has been unable to verify these allegations and suspects that they are either false or imagined.
5. A report from Soller's Point High School in Maryland indicates that he created disturbances at school, was hostile toward his teachers. Mrs. Peggy Williams Moore indicated to an investigator of the Legal Aid Agency that Alfred brooded continually and was very difficult to handle.

^{1/} See letter of Judge Jones dated October 4, 1963, to Legal Aid Agency; tr. 5, 7. Neither party has at any time questioned or objected to Judge Jones' decision to treat appellant's motion as one made under Rule 32(d).

6. Mrs. Weaver, Principal of Central Elementary School indicated to an investigator from the Agency that Alfred stole continuously, was hostile to his foster brothers, would leave the house without telling anyone and "could never adjust to being away from D.C."

7. Dianne Bullock, sister of the defendant, indicated that Alfred was constantly in fights as a child intentionally provoking arguments with his classmates. On one occasion in an argument with his sister the defendant threatened to kill her, her husband and her children. Mrs. Bullock stated that this outburst had a quality "different" from the ordinary angry threat made by most people.

A hearing on all three of appellant's pending motions was held before Judge Jones on February 14, 1964. No testimony was taken, and the prosecution did not attempt in any way to contravene the allegations concerning appellant's mental condition contained in his motions. Appellant, through counsel, repeatedly argued that, in view of the allegations made concerning his mental condition, the court should order a mental examination before ruling on his motions under Rule 32(d) and for reduction of sentence (tr. 8 17). Thus, he stated (tr. 17):

"But I would submit, Your Honor, in order properly to assist the Court in deciding later on a motion for reduction of sentence... or on the Rule 32(d) motion, counsel ought to get, the defendant ought to get, and the Court ought to have, psychiatric assistance in reaching this decision. By no means, Your Honor, do we assert that these grounds are sufficient to justify the Court, without psychiatric testimony, in setting aside that plea of guilty."

Appellant stressed that the court "always has authority to order a mental examination of a defendant, whose mental condition would be relevant to a consideration of any of the Court's rules, on any motions" (tr. 7). He urged that the motions presented "enough evidence for the Court to be on notice and to exercise its discretion to seek expert psychiatric assistance in such matters" (tr. 15). "We do not assert that [appellant] is ill. We merely ask the Court to find out" (tr. 19).

In addition, appellant pointed out that the results of a mental examination might show that he was mentally ill at the time of the crime or mentally incompetent when he entered his guilty plea (tr. 8, 18, 19). His counsel said (tr. 19):

"I think the issue is, one, whether he had a valid defense, which with newly discovered evidence would be grounds for a new trial and therefore for withdrawal of the guilty plea, or whether he was not competent to enter a plea of guilty."

Despite the fact that the allegations concerning appellant's mental condition were uncontroverted, the court denied a mental examination, stating simply that "I don't think you have made a sufficient showing" (tr. 22).^{2/} The court then denied appellant's motion under Rule 32(d) to withdraw his plea of guilty (tr. 22). Appellant's motion for reduction of sentence was also denied by the court on the ground that, under Rule 35, F.R. Crim. P., it lacked jurisdiction to entertain the motion (tr. 7, 21).

RULE INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure, 18 U.S.C., provides as follows:

"(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

^{2/} The court did not base its ruling on the fact that the allegations regarding appellant's mental condition were not contained in affidavits (tr. 22).

STATEMENT OF POINTS

1. The District Court erred in denying appellant's motion for mental examination.

2. The District Court erred in denying appellant's motion to withdraw his plea of guilty and to vacate the sentence entered thereon without first ordering that appellant be given a mental examination.

(With respect to each of these points, appellant desires the Court to read the transcript of proceedings on February 14, 1964, pages 1 - 25, inclusive; appellant's pro se motion to withdraw his plea of guilty; and appellant's motion for mental examination.)

SUMMARY OF ARGUMENT

I.

Contrary to the District Court's ruling, the uncontroverted allegations concerning appellant's mental condition contained in his motions were plainly sufficient to require a mental examination. There were allegations (which, being unchallenged by either the prosecution or the court, must be taken as true) that appellant could not control his actions plus an enumeration of specific instances of plainly abnormal behavior over a period of years. The standard applied by this Court to motions for mental examination, both before and after the 1955 amendment to §24-301(a), D.C. Code, requires only a minimal or non-frivolous showing by the movant. Mitchell v. United States, 114 U.S. App. D.C. 353, 316 F.2d 354 (1963); Wear v. United States, 94 U.S. App.

D.C. 325, 218 F.2d 24 (1954). Furthermore, post-sentence motions for mental examination (as in the instant case), which are not covered by §24-301(a), or motions simply not directed to that section, are apparently not subject to the "prima facie evidence" requirement of §24-301(a). Leach v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 18,198, decided April 9, 1964). In the instant case, the allegations concerning appellant's mental condition more than satisfied the standards set forth in the cited cases. Appellant's motions raised the possibility that a mental examination might disclose that he was suffering from mental illness at the time of the crime or that he was mentally incompetent when he entered his guilty plea -- disclosures that might well have led the court to grant appellant's request to withdraw his guilty plea. Appellant, incarcerated and indigent, had, "on adequate averment, . . . the right to assistance of the court in developing the basis" for his contention that he should be allowed to withdraw his guilty plea (Brown v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 18,026, decided April 10, 1964), slip op., p. 2).

II.

The District Court erred in rejecting appellant's request that, prior to ruling on his motion to withdraw his plea of guilty, the court order a psychiatric examination to determine his mental capacity at the time of the crime and when he entered his guilty plea. On a

post-sentence motion under Rule 32(d), F.R. Crim. P., appellant was required to establish "manifest injustice" in order to prevail. A mental examination might have established that appellant was mentally ill at the time of the crime or when he pleaded guilty and, therefore, that it would be "manifestly unjust" for his guilty plea and conviction to stand. This Court has fully recognized the pertinency of allegations concerning a defendant's mental condition to a determination on a motion to withdraw a plea of guilty. E.g., Gearhart v. United States, 106 U.S.App. D.C. 270, 272 F.2d 499 (1959).

Where a defendant's mental capacity has fairly been placed in issue, it is error for the District Court to rule upon a matter before it to which such mental capacity is pertinent, without first ordering a mental examination. Leach v. United States, supra; Jones v. United States, ___ U.S. App. D.C. ___, 327 F.2d 867 (1963). In Leach, this Court held that it was error for the District Court to disregard allegations concerning the defendant's mental condition and to proceed to sentence him without first ordering a mental examination. Similarly, in Jones, it was held that the District Court erred in ruling upon defendant's motion for reduction of sentence before acting on his motion for mental examination. In the instant case, as in Leach and Jones, we cannot know what conclusion the District Court might have reached on appellant's motion to withdraw his guilty plea if it had first ordered a mental examination. Appellant does not contend that the present record establishes either mental illness or sufficient grounds to require

that he be allowed to withdraw his guilty plea; he simply asks the court to find out whether sufficient grounds exist. In light of the uncontroverted allegations made indicating possible mental illness, it was error for the District Court to deny appellant's motion to withdraw his guilty plea without first ordering a mental examination.

ARGUMENT

I.

The Uncontroverted Allegations Concerning Appellant's Mental Condition As Set Forth in His Motions Were Sufficient to Require a Mental Examination.

The District Court denied appellant's motion for mental examination on the sole ground that appellant had failed to make a "sufficient showing" (tr. 22). The allegations concerning his mental condition set forth in both the motion for mental examination and in his pro se motion were not controverted in any way by the prosecution. Nor did the District Court discredit or question the veracity of these allegations. It simply held that they were insufficient. In so holding, we submit that the District Court plainly erred.

The allegations concerning appellant's mental condition contained in his two motions, "being unquestioned by the Government or the court, must be taken as true." Brown v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 18,026, decided April 10, 1964), slip op., p. 2. These allegations indicated that appellant might well have been in the past, and still be, suffering from mental illness. In his pro se motion, appellant repeatedly expressed an inability to comprehend or

control his actions. He said, "I think that I am incapable of controlling my mental conditions, I am not capable of realizing some of the things that I do" He attributed this condition to his "confused" childhood. In addition, in his motion for mental examination, it is stated that appellant has "for some years" experienced periods of depression and often has "fantasies" in which he whips people "who in his life 'have been against him'." Also, this motion presents detailed evidence gained from persons who knew him that, as a child, appellant "stole continuously"; "brooded continually"; "continually" ran away from home; and was unusually hostile to others. Appellant's sister referred to an incident in which appellant threatened to kill her, her husband and her children, and she said that "this outburst had a quality 'different' from the ordinary angry threat made by most people." And the motion recites instances of "possible paranoid content," such as appellant's apparently unfounded belief that "one foster mother lock[ed] him in his room for 'months at a time' each day after school."

This Court has in previous cases considered the standard to be applied in determining the sufficiency of motions for mental examination. In Wear v. United States, 94 U.S. App. D.C. 325, 218 F.2d 24 (1954), the Court, construing 18 U.S.C. §4244, held "that a motion on behalf of an accused for a mental examination, made in good faith and not frivolous, must be granted under the statute" (94 U.S. App. D.C. at 328; 218 F.2d at 27). Although the statute required that the movant

have "reasonable cause to believe" that the accused may be mentally incompetent and set "forth the ground for such belief" in the motion, this Court concluded that (p. 327; 26):

"... this requirement confers upon the Court merely the limited power to review the motion and to deny it when the ground alleged is frivolous, or when the motion is not made in good faith." (Footnote omitted.)

The basic rationale for this standard was stated as follows (ibid.):

"When the claim of insanity is not frivolous, to allow the court to determine that there is no cause to believe that an accused may be insane or otherwise mentally incompetent would be inconsistent with the legislative purpose to provide for the detection of mental disorders 'not * * * readily apparent to the eye of the layman.'"

See Lloyd v. United States, 101 U.S. App. D.C. 116, 247 F.2d 522 (1957); Perry v. United States, 90 U.S. App. D.C. 186, 195 F.2d 37 (1952); Kelley v. United States, 95 U.S. App. D.C. 267, 221 F.2d 822 (1954).

Although this Court has not, to our knowledge, expressly considered the applicability of the Wear standard since the 1955 amendment of §24-301, D.C. Code, to require that "prima facie evidence" of mental illness be "submitted to the court,"^{3/} a standard very close to the one formulated in Wear evidently continues

^{3/} Section 24-301(h) provides that "[t]he provisions of this section shall supercede in the District of Columbia the provisions of any Federal statutes or parts thereof inconsistent with this section."

to be applied to motions under §24-301(a). See Mitchell v. United States, 114 U.S. App. D.C. 353, 357-359, 316 F.2d 354, 358-360 1963; Brown v. United States, supra. In Mitchell, the Court held that a pre-trial motion for mental examination was "adequate" where "supported by uncontroverted allegations that defendant suffered from delusions, epilepsy and exhibited unexplained and repeated criminal behavior" (pp. 358-359; 359-360). The Court stated (p. 359; 360):

"The requirement of prima facie evidence must be read in the light of the limited purposes of the requested examination. A chief purpose is to get evidence on whether the accused is or is not competent to stand trial. Another purpose is to get evidence on whether, if there is a trial, the jury should be instructed on insanity and criminal responsibility. It cannot reasonably be supposed that Congress intended to require the accused to produce, in order to get a mental examination, enough evidence to prove that he is incompetent or irresponsible. That is what the examination itself may, or may not, produce. If the accused already had such evidence, there would be little need for the examination. Less evidence is required for a jury instruction than for a directed verdict. McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962). Still less should be required for a mental examination." (Footnotes omitted.)

And in Brown, supra, allegations of narcotics addiction were held to be sufficient to require a mental examination. See also Calloway v. United States, 106 U.S. App. D.C. 141, 270 F.2d 334 (1959); Winn v. United States, 106 U.S. App. D.C. 133, 270 F.2d 326 (1959).

Furthermore, post-sentence motions for mental examination (as in the instant case), which are not covered by §24-301(a), ^{4/} or motions

^{4/} Cf. Cameron v. Fisher, 116 U.S. App. D.C. 9, 320 F.2d 731 (1963).

5/
simply not directed to that section, are apparently not subject to the "prima facie evidence" requirement. Leach v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 18,198, decided April 9, 1964), slip op., p. 5. Thus, in Leach, supra, where a motion for mental examination was made under §24-106, D.C. Code, setting forth evidence of extreme recidivism and a prior diagnosis of the defendant as a "psychopathic personality, unstable . . .," the Court said that "assuming arguendo" that this evidence failed to constitute a prima facie case, "it was enough to make clear the usefulness of a psychological evaluation in determining the sentence" (slip op., p. 5). And in Jones v. United States, ___ U.S.App.D.C. ___, 327 F.2d 867 (1963), where the defendant, having moved for reduction of sentence, sought a determination of his mental condition as of that time, an affidavit by defendant's sister, stating in rather general terms her belief that the defendant "is now suffering from a severe disorder," was found to be sufficient to require a mental examination (see pp. 872-873). 6/

5/ The court's authority, apart from §24-301(a), to order a mental examination of a defendant seems unquestioned. Leach v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 18,198, decided April 9, 1964), slip op., pp. 4-5; Winn v. United States, 106 U.S.App.D.C. 133, 135, 270 F.2d 326, 328 (1959); Watson v. Cameron, 114 U.S.App.D.C. 151, 312 F.2d 878 (1962); Cooper and Kennedy v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___ (Nos. 17,669, 17,670, decided April 9, 1964) (concurring opinion). See §§24-106, 21-308, D.C. Code (1961); Rule 28, F.R.Cr.P., 18 U.S.C.

6/ Judge Wright, in a concurring opinion in which Chief Judge Bazelon and Judge Fahy joined, being of the view that Jones was to be "re-sentenced" and that defense counsel incorrectly sought a "reduction" in sentence, deemed §24-301(a) to be applicable to the motion for mental examination (pp. 878-879).

In the instant case, the allegations concerning appellant's mental condition more than satisfied the standards set forth in Wear, Mitchell and the other cited cases. There were unchallenged allegations that appellant could not control his actions plus an enumeration of specific instances of plainly abnormal behavior over a period of years. Appellant's motions raised the possibility that a mental examination might disclose that he was suffering from mental illness at the time of the crime or that he was mentally incompetent when he entered his guilty plea -- disclosures that might well have led the court to grant appellant's request to withdraw his guilty plea. See discussion, infra. Appellant, incarcerated and indigent, plainly could not secure needed psychiatric evidence without the aid of the court. As in Brown v. United States, supra, slip op., p. 2, "On adequate averment," he had "the right to assistance of the court in developing the basis" for his contention that he should be allowed to withdraw his guilty plea.

That appellant's motion for mental examination came at a post-sentence stage is immaterial. The motion in Jones was likewise made after imposition of sentence. The essential factors in Jones, as here, were that the defendant's mental condition was pertinent to a determination before the court and sufficient allegations indicating the possibility of mental abnormality had been made. In such situations, we submit, a mental examination is required.

Accordingly, the District Court erred in denying appellant's

motion for a psychiatric examination to determine his mental capacity at the time of the crime and when he entered his guilty plea.

II.

The District Court Erred In Denying Appellant's Motion to Withdraw His Plea of Guilty and to Vacate the Sentence Entered Thereon Without First Ordering That He Be Given a Mental Examination.

The District Court, without objection, treated appellant's pro se motion as a motion to withdraw his guilty plea and vacate the sentence entered thereon. At the hearing on this motion, appellant, through counsel, repeatedly asked that the court, prior to ruling on the motion, order an examination as to his mental capacity both at the time of the crime and when he entered his guilty plea (see tr. 8, 17, 18, 19). The District Court, however, refused to order a mental examination or to withhold ruling on the motion to withdraw the guilty plea until after such an examination could be obtained. In so doing, we submit that the Court erred.

The relevance of appellant's mental condition at the time of the crime, and when he pleaded guilty, to a determination of the motion under Rule 32(d) to withdraw the guilty plea is evident. On a post-sentence motion under Rule 32(d), appellant was required to establish "manifest injustice" in order to prevail. A mental examination might have established that appellant was mentally ill at the time of the crime -- a circumstance which might have been unknown to

appellant's counsel in the lower court. Surely, if appellant was not legally responsible for the acts upon which his conviction is based, it would be "manifestly unjust" for his conviction to stand and his punishment to continue. See, e.g., Blunt v. United States, 100 U.S. App. D.C. 266, 278, 244 F.2d 355, 367 (1957); Williams v. United States, 102 U.S. App. D.C. 51, 58, 250 F.2d 19, 26 (1957). Cf. Robinson v. State of California, 370 U.S. 660 (1962). Similarly, if appellant was mentally incompetent when he entered his guilty plea, then the plea could not have been voluntary, and it would be 'manifestly unjust' to refuse to permit its withdrawal. See Carter v. United States, 113 U.S. App. D.C. 123, 306 F.2d 283 (1962); Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963).

This Court has recognized fully the pertinency of allegations concerning a defendant's mental condition to a determination on a motion to withdraw a guilty plea. Gearhart v. United States, 106 U.S. App. D.C. 270, 272 F.2d 499 (1959); Briscoe v. United States, 102 U.S. App. D.C. 145, 251 F.2d 386 (1958); Poole v. United States, 102 U.S. App. D.C. 71, 250 F.2d 396 (1957). In Poole, which involved a pre-sentence motion, allegations that defendant had suffered a skull fracture years earlier and experienced headaches were held to raise a sufficient question as to his mental capacity to require that leave to withdraw his guilty plea be allowed. Similarly, in Gearhart, likewise involving a pre-sentence motion, defendant's allegations that he had a "brainlock" and had some time

earlier received psychiatric treatment, were held to require that he be allowed to withdraw his guilty plea. With regard to the relevancy of evidence of mental illness at the time of the crime, the Court said in Gearhart (p. 274; 503):

"On this appeal, the Government makes the rather startling argument that 'the issue of insanity at the time of the offense is not germane to the withdrawal of the plea of guilty.' A reading of our decisions in Poole v. United States, *supra*, and Briscoe v. United States, 1958, 102 U.S. App. D.C. 145, 251 F.2d 386, should have sufficed to dispel that misconception."
(Footnote omitted.)

To be sure, the motions in Gearhart and Poole, having been made prior to sentence, did not have to meet the burden of showing "manifest injustice." But in Leonard v. United States, 231 F.2d 588 (5th Cir. 1956), where the court held that a post-sentence motion should have been granted, it was said (p. 590):

"The right to trial by jury being one of the most valuable and most highly cherished rights guaranteed by the Constitution, the courts have been understandably slow in holding an accused to an election to waive this right and enter a plea of guilty."

And in Pilkington v. United States, *supra*, the court noted (315 F.2d at 209):

"While there may be a considerable overlap, the concept of 'manifest injustice' under Rule 32(d) permits the judge a greater latitude than the requirements of constitutional 'due process.' See United States v. Lester, 247 F.2d 496, 500 (2nd Cir. 1957); Georges v. United States, 262 F.2d 426, 430 (5th Cir., 1959)."

See also Carter v. United States, *supra*.

Appellant's contention, however, is not that "manifest injustice"

appears on the present record. Rather, it is that if a mental examination were to be granted, then "manifest injustice" might be shown. Like the defendants in Leach v. United States, supra, and Jones v. United States, supra, we submit that where a defendant's mental capacity has fairly been placed in issue, it is error for the District Court to rule upon a matter before it to which such mental capacity is pertinent, without first ordering a mental examination.

The two Leach opinions and the decision in Jones are most instructive in the instant case. In Leach, the District Court refused the defendant's request for a mental examination prior to sentencing. On appeal, 115 U.S. App. D.C. 351, 320 F.2d 670 (1963), this Court discussed the various procedures available to a sentencing judge for obtaining information concerning a defendant's mental condition (pp. 353-354; 672-673):

" . . . the Congress has placed several aids at the disposal of the sentencing judge . . . 24 D.C. Code §301 provides for commitment prior to sentence to a hospital for examination to determine the mental competence of the offender. 24 D.C. Code §106 provides for the appointment of a qualified psychiatrist and a qualified psychologist to assist judges of the District Court in criminal cases in carrying out their duties. Unfortunately, a chart furnished the District Court by its Legal Psychiatric Services, created pursuant to this statute, indicates that in the year 1962, during which the District Court imposed 1041 sentences, the Legal Psychiatric Services was called upon to make only three pre-sentence examinations." (Footnotes omitted.)

Finding "no indication here that the court, in imposing as it did the maximum penalty provided by the statute, made use of any of the aids

to sentencing placed at its disposal by the Congress," this Court remanded for resentencing (p. 354; 673).

On remand, the defendant made a formal motion for mental examination under §24-106, D.C. Code. The District Court, however, finding no "competent evidence" of mental illness, refused to order a mental examination and reinstated the original sentence. 218 F. Supp. 271, 274 (D.D.C. 1963). This Court, on April 9, 1964, summarily reversed. The Court stated (slip op., pp. 3-4):

"... That the judge thought there was no competent evidence of 'mental illness' should not have precluded an examination as an aid to sentencing and treatment. 6/

6/ If the judge thought Leach was raising an issue of incompetency or insanity, even as late as sentencing, it would have been well to order a mental examination to avoid the necessity of a later §2255 motion. See Mock v. United States (No. 15395, 6th Cir., decided March 31, 1964)."

Again reviewing the availability to the sentencing judge of psychiatric services, the Court held that "the adamant refusal in this case to refer the prisoner for a mental examination was an abuse of discretion" (p. 4). The Court set aside the sentence and remanded to the District Court with instructions to order a mental examination before resentencing.

In Jones v. United States, supra, as in Leach, this Court found error in the District Court's refusal to order a mental examination prior to ruling on a matter before it (there, a motion for reduction of a death sentence) to which the defendant's mental condition was pertinent. The District Court had acted on defendant's motion for mental

examination only after it had denied his motion for reduction in sentence. This Court stated (327 F.2d at 872--873):

"The course of proceedings as this record shows, had clearly become inverted, for the ruling came without consideration of the pending motion for a mental examination. That motion, on file since October 2, 1962, had asked 'for a complete mental examination at this time.' It was supported by the unrefuted affidavit of the appellant's sister. It is our conclusion since life was at stake, the judge on October 19, 1962, should not have acted upon the motion for reduction of sentence without consideration of adequate information as to the appellant's mental condition or possible lack of mental competency as of that date. Such an examination might have disclosed that the appellant then was unable to understand the nature of the proceedings and to assist his counsel or to make allocution in his own behalf. Had such lack of mental competency appeared, for as long as that condition might continue, the law would have required that the death sentence not be executed and that the appellant be committed to a mental institution. On the record here, we conclude that an examination of such scope and depth as we have noted was an imperative prerequisite that there might be a determination of present competency." (Footnote omitted.)

"We can not know," the Court added, "what conclusion might have been reached, had the judge here . . . conducted the permissible inquiry before passing upon the motion to reduce sentence" (pp. 874-875). Cf. Peters v. United States, 113 U.S. App. D.C. 236, 307 F.2d 193 (1962).

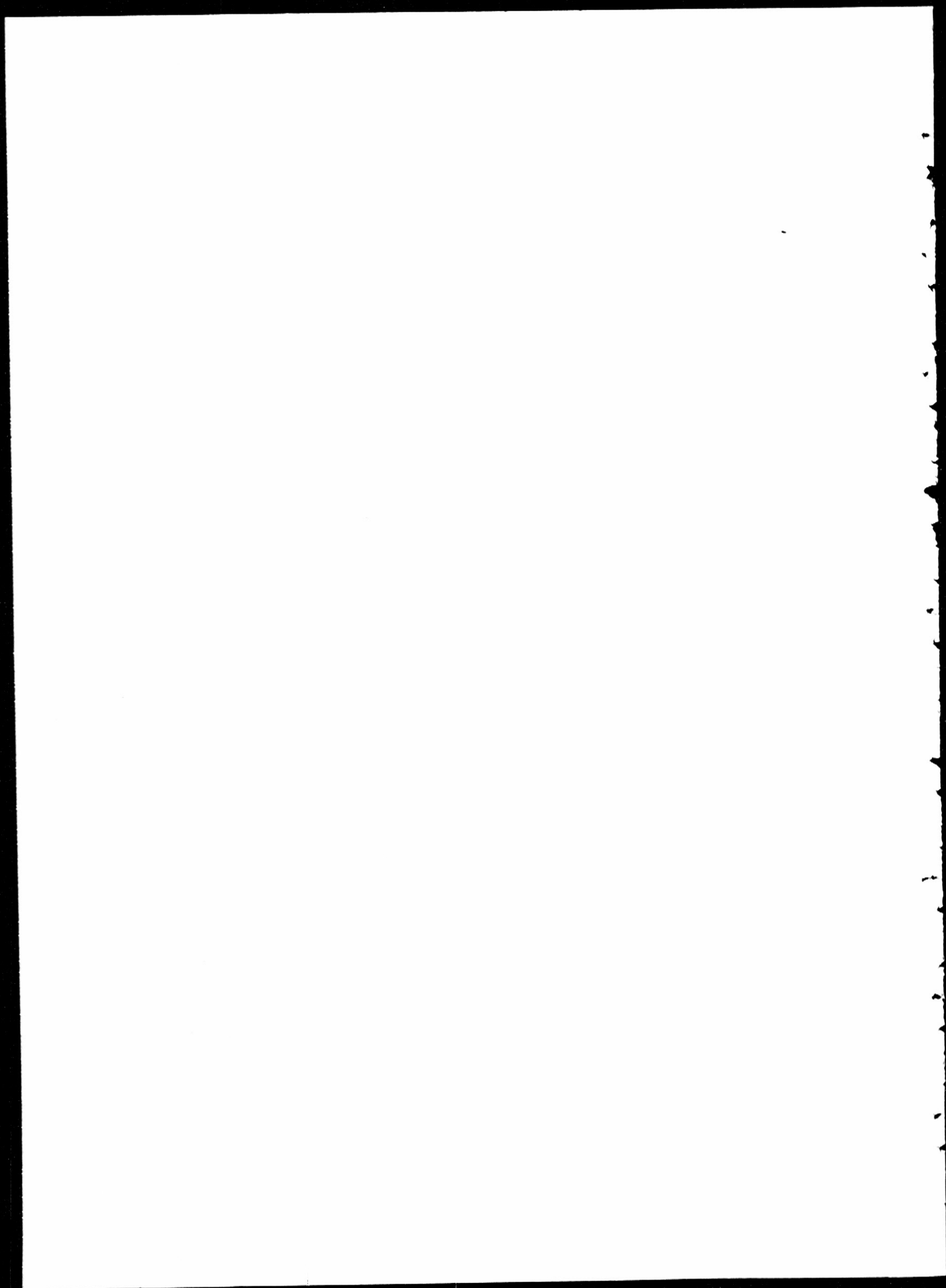
Similarly, in the instant case, we cannot know what conclusion the District Court might have reached on appellant's motion to withdraw his guilty plea if it had first ordered a mental examination. The results of such an examination, as we have shown, might well have established a case of "manifest injustice" requiring that leave to withdraw the guilty plea be granted. Certainly, the facilities available to the District Court for obtaining information concerning the mental

capacity of criminal defendants, as discussed in Leach, are not limited to use at the time of sentencing. Section 24-106, D.C. Code, makes "a qualified psychiatrist and a qualified psychologist" available to District judges "to assist them in carrying out their duties . . . in criminal cases," i.e., regardless of the procedural stage. An independent psychiatric examination could likewise have been ordered. See Watson v. Cameron, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962); Cooper and Kennedy v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (Nos. 17,669, 17,670, decided April 9, 1964) (concurring opinion).

In sum, appellant does not contend that the present record establishes either mental illness or sufficient grounds to require that he be allowed to withdraw his guilty plea; he "merely ask[s] the Court to find out" whether sufficient grounds exist (tr. 19). We submit that where, as here, an issue concerning the defendant's mental capacity has been adequately raised, it was error for the District Court to rule upon a matter before it to which such mental capacity is pertinent (here, a motion to withdraw a guilty plea), without first ordering a mental examination.

CONCLUSION

For the foregoing reasons, this Court should vacate the order of the District Court denying appellant's motions for mental examination and to withdraw his plea of guilty and remand the case to the District



Court with instructions to order a psychiatric examination as to appellant's mental capacity at the time of the crime and when he entered his guilty plea, before ruling on the motion to withdraw the guilty plea.

Respectfully submitted,

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Attorney for Appellant
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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

- - - - -
Nos. 18,439 18,526
- - - - -

ALFRED E. WARREN,
APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

OF COUNSEL:

LAWRENCE J. BERNARD, JR.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 10 1964

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,439, 18,526

ALFRED E. WARREN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

In arguing that the District Court's denials of appellant's motions to withdraw his plea of guilty and for a mental examination were proper because the present record fails to establish "manifest injustice" or mental incompetence at the time of the guilty plea, the Government misses entirely the thrust of appellant's contentions. Appellant does not contend that "manifest injustice" appears on the instant record but rather that such injustice might be shown if a mental examination was to be held. Similarly, we do not contend that the allegations of appellant's motions establish mental incompetence; that is what

the psychiatric examination is supposed to determine. See appellant's brief, pp. 17-18, 21. As this Court said in Mitchell v. United States, 114 U.S. App. D.C. 353, 359, 316 F.2d 354, 360 (1963):

" . . . It cannot reasonably be supposed that Congress intended to require the accused to produce, in order to get a mental examination, enough evidence to prove that he is incompetent or irresponsible. That is what the examination itself may, or may not, produce. If the accused already had such evidence there would be little need for the examination."

Appellee incorrectly treats the question of appellant's competence at the time of his guilty plea as the only relevant issue raised by the allegations concerning his mental state. Contrary to this view, the question of appellant's mental condition at the time of the crime is most pertinent. As we have shown (appellant's brief, pp. 15-16), evidence that appellant was mentally irresponsible at the time of the crime might well establish "manifest injustice" under Rule 32(d). Cf. Gearhart v. United States, 106 U.S. App. D.C. 270, 274, 272 F.2d 499, 503 (1959). The significance of this point is, of course, that appellant's burden in establishing reasonable doubt as to his responsibility at the time of the crime is considerably less than his burden in demonstrating incompetence when he entered his guilty plea. See Lyles v. United States, 103 U.S. App. D.C. 22, 254 F.2d 725, 729 (1957) cert. den., 356 U.S. 961 (1958); McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847, 849 (1962).

Appellee's suggestion that the District Court does not "have jurisdiction to order a mental examination after sentencing" must be rejected. Under the plain language of Section 24-106, D.C. Code, a mental examination may be ordered at any time in the course of a criminal case. Moreover, the District Court has inherent authority, apart from any statute, to order a psychiatric examination. Watson v. Cameron, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962); Cooper and Kennedy v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (Nos. 17,669, 17,670, decided April 9, 1964) (concurring opinion); see Rule 28, F.R.Cr.P., 18 U.S.C. And it should be noted that the mental examination in Jones v. United States, 111 U.S. App. D.C. 276, 327 F.2d 867 (1963) was ordered after sentence had been imposed. See appellant's brief, pp. 13, note 5, 14, 21.

Finally, we fail to understand appellee's suggestion that the motion for mental examination arose under 28 U.S.C. §2255. This motion was made in conjunction with appellant's motions under Rules 32(d) and 35 of the Federal Rules of Criminal Procedure.^{1/} As the

^{1/} Appellee is simply wrong in stating (p.5, note 3), without citation, that "[a]t the hearing appellant, through counsel, coupled his request for a mental examination solely with the motion for reduction in sentence, under Rule 35, F.R.Cr.P, not with the motion to withdraw the plea." Contrary to appellee's statement, the record of the hearing shows clearly that the motion for mental examination was "coupled" to both of the other motions (see tr. 6,7,8,17,18,19). For example, appellant's counsel said at the hearing (tr. 6): "...it also became clear to me, in order to determine the validity of his claims under his pro se motion /The Rule 32(d) motion/, as well as to further consider his motion for reduction of sentence, there ought to be a motion for mental examination filed."(Emphasis added.)

record plainly shows, the proceedings on all three motions were part of Criminal No. 363-63, the original criminal case, not a collateral proceeding.^{2/} Although not expressly stated in the motion, appellant's request for a mental examination was premised upon §24-106, D.C. Code, and upon the inherent authority of the court to order such an examination (see tr. 7-8). See discussion, supra.

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^{2/} In attempting to classify the instant proceeding as a collateral attack upon the conviction, appellee ignores the fact that a direct appeal from the judgment and commitment is before the Court.

BRIEF FOR APPELLEE

United States Court of Appeals
For the District of Columbia Circuit

Nos. 18,439
18,526

ALFRED E. WARREN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court
for the District of Columbia

United States Court of Appeals

for the District of Columbia Circuit

FILED JUL 13 1964

Nathan J. Paulson
CLERK

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,

DAVID EPSTEIN,
Assistant
United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee the following questions are presented on appeal.

1.) Did the District Court err in holding that manifest injustice was not present so as to permit the withdrawal of a plea of guilty after sentencing where appellant raised, for the first time, allegations which, even if believed, do not make a showing of incompetence at the time the plea of guilty was entered?

2.) Is appellant entitled to a mental examination under 28 U.S.C. § 2255, where his allegations, if believed, show no previous history of psychiatric treatment nor that his plea of guilty was other than freely and voluntarily entered?

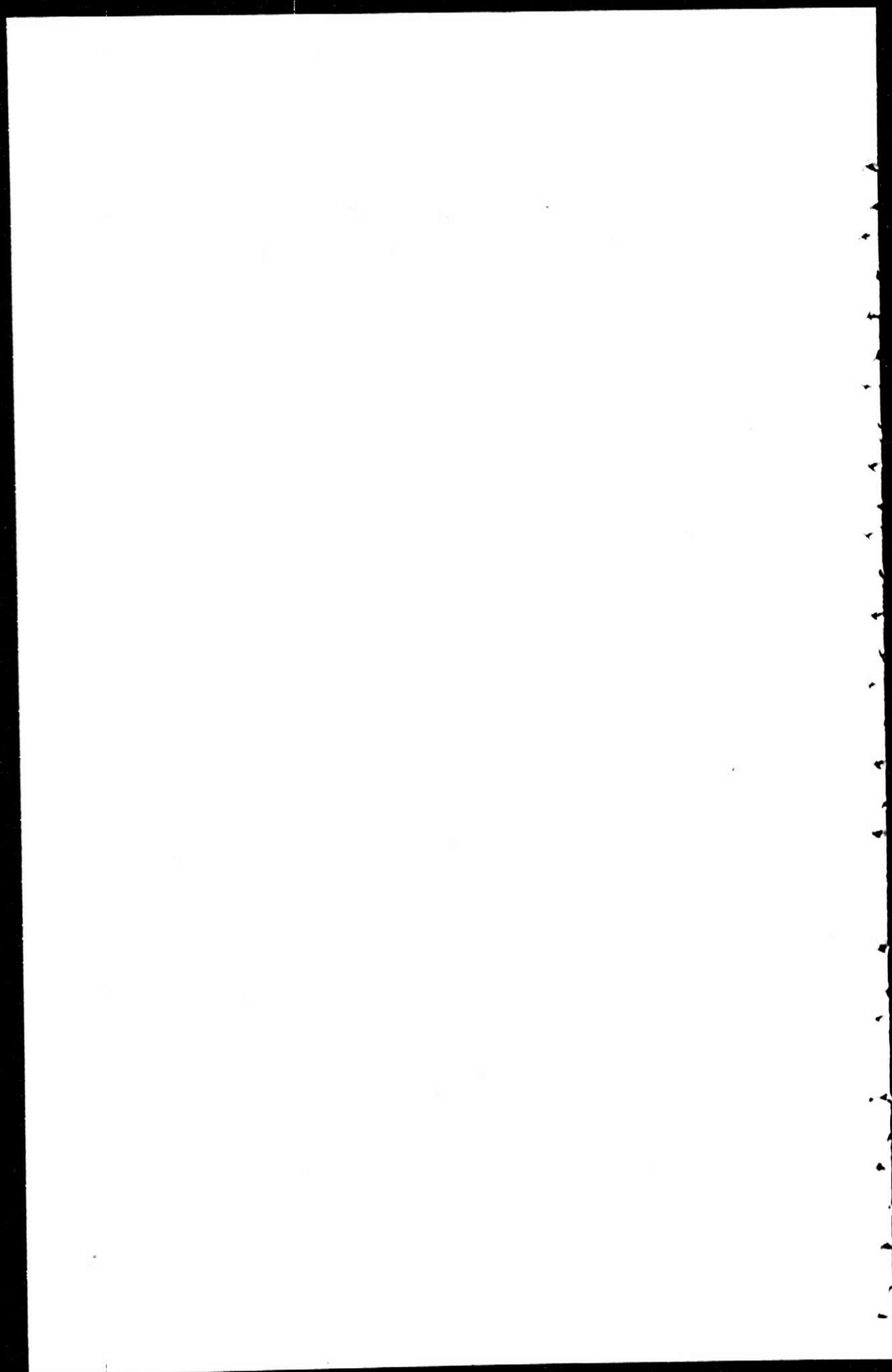
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* Cases chiefly relied upon are marked with asterisks.



**United States Court of Appeals
For the District of Columbia Circuit**

Nos. 18,439
18,526

ALFRED E. WARREN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on April 22, 1963, appellant was charged with a two count criminal violation of the District of Columbia Code: housebreaking (22 D.C.C. § 1801) and robbery (22 D.C.C. § 2901). On June 6, 1963, appellant, represented by counsel,¹ withdrew his plea of guilty and, after extensive examination by the District Court dealing with any promises or threats, the consequences of a plea of guilty, and the voluntariness of the plea, entered a plea of guilty to the robbery count of the indictment. Appellant also indicated that nothing was wrong with him mentally and that he was satisfied with the services of his attorney.

¹ No question with respect to effective assistance of counsel was raised at the hearing on February 14, 1964 (Tr. 8).

On August 16, 1963, appellant was sentenced to a term of imprisonment of four (4) to twelve (12) years. The remaining count of the indictment was then dismissed. (See Record.)

During the following months appellant pro se and subsequently through his new court-appointed counsel, a member of the Legal Aid Agency, filed three motions: 1) to withdraw his plea of guilty under Rule 32(d), Fed. R. Crim. P.; 2) to reduce sentence under Rule 35, Fed. R. Crim. P.; and 3) for a mental examination.

At a hearing on February 14, 1964, the sentencing court held that it was without jurisdiction to reduce sentence inasmuch as the motion was filed on December 30, 1963, more than sixty days after the imposition of sentence, and denied the motion.

With respect to the motion for a mental examination, appellant, through counsel, did not state that he was incompetent to enter a plea of guilty nor that he was suffering from a mental disease. Rather, appellant stated, "This (motion) is supposed to be a presentation of enough evidence for the Court to be on notice and to exercise its discretion to seek expert psychiatric assistance in such matters (Tr. 5) . . . We do not assert that (appellant) is ill. We merely ask the Court to find out (Tr. 19)."

Indicating that he had adequate opportunity to observe appellant, the District Court noted in response, ". . . you don't realize that this man sat in this courtroom on that witness chair and testified about this robbery, this hold-up, this beating up of this man. Now am I supposed to forget all of that, too? . . . Are you telling me that (appellant) didn't know what he was saying when he got on the witness stand and testified in the case that this other boy wasn't even there? (Tr. 18-19)."² The court, stating that a sufficient showing had not been made for a mental examination, denied that motion (Tr. 22). The motion for withdrawal of the plea of guilty was also denied (Tr. 24).

From the denial of these motions this appeal followed.

² For the facts of the crime predicated the plea, see briefs in *Parrish v. United States*, No. 18095, affirmed by Order, dated March 24, 1964.

RULE INVOLVED

Rule 32(d), Federal Rules of Criminal Procedure, provides:

Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

SUMMARY OF ARGUMENT

The District Court properly exercised its discretion in denying appellant's motion to withdraw his plea of guilty after the imposition of the sentence. To succeed appellant must make a showing of manifest injustice, which he does not do. At the time of the plea, appellant was represented by counsel and thoroughly questioned by the District Court with regard to his mental condition and the circumstances under which he was entering the plea. In a motion for a mental examination, filed after the sentencing, appellant suggests that he *may* have been incompetent to enter the plea of guilty; yet the allegations, even if believed, do not show him to have been incompetent at the time the plea was entered. Also, the District Court had an opportunity to closely observe appellant's competence when he testified in the trial of his co-defendants.

Even treating appellant's request for a mental examination as arising under 28 U.S.C. § 2255, he is not entitled to a mental examination since no sufficient showing was made to support such a request.

ARGUMENT

**The District Court Properly Exercised Its Discretion in Not
Allowing Appellant to Withdraw a Plea of Guilty After
Sentencing.**
(See Tr. 22.)

Appellant was allowed to enter a plea of guilty to a charge of robbery after extensive questioning by the District Court which determined that appellant was aware of the consequences of such a plea, was not under any duress or coercion, and was making the plea freely and voluntarily. Appellant further indicated that he was not suffering from any mental disease or defect. He was later sentenced to a term of imprisonment; the remaining charge of the indictment, housebreaking, was then dismissed. (See Record.)

Subsequently, appellant filed a motion which the court treated as arising under Rule 32(d), Fed. R. Crim. P., to withdraw his plea. A motion to withdraw a plea of guilty after sentencing is available only to prevent manifest injustice; the trial court has wide discretion in making such a determination. Rule 32(d), Fed. R. Crim. P.; *e.g. Smith v. United States*, 116 U.S. App. D.C. 404, 408, 324 F.2d 436, 440 (1963); *High v. United States*, 110 U.S. App. D.C. 25, 288 F.2d 427 (1961), *cert. denied*, 366 U.S. 923; *Scott v. United States*, 292 F.2d 49 (6th Cir. 1961), *cert. denied*, 368 U.S. 871; *Vasquez v. United States*, 279 F.2d 34 (9th Cir. 1960); *Friedman v. United States*, 200 F.2d 690, 696-697 (8th Cir. 1952), *cert. denied*, 345 U.S. 926, *reh. denied*, 345 U.S. 961. It is generally held that before relief under Rule 32(d) may be sought a defendant must at the very least assert his innocence of the charge to which he pleads guilty. *United States v. Norstrand Corp.*, 168 F.2d 481 (2d Cir. 1948); *United States v. Holland*, 170 F. Supp. 83 (D.C. D.C. 1959). Appellant makes no such assertion in this case. Nor does he make any other showing of manifest injustice within the accepted meaning of the term. Addressing itself to the standard for the withdrawal of a plea of guilty after sentencing, the Eighth Circuit in *Friedman v. United States*, *supra*, 200 F.2d at 696, stated:

The issue for determination is whether the plea of guilty was voluntarily, advisedly, intentionally, and understandingly entered or whether it was at the time of its entry, attributable to force, fraud, fear, ignorance, inadvertence, or mistake such as would justify the court in concluding that it ought not to be permitted to stand.

Withdrawal of pleas of guilty after sentencing were allowed where the defendant was not represented by counsel and did not understand the charges as in *United States v. Lester*, 247 F.2d 496 (2d Cir. 1957); *Smith v. United States*, 238 F.2d 925 (5th Cir. 1956); *Bergen v. United States*, 145 F.2d 181 (8th Cir. 1944), or where the defendant was given erroneous legal advice from a Government agent as in *Von Moltke v. Gillies*, 332 U.S. 708 (1947). See, *Edwards v. United States*, 103 U.S. App. D.C. 152, 256 F.2d 707 (1958), *cert. denied*, 358 U.S. 847; *Futterman v. United States*, 91 U.S. App. D.C. 331, 202 F.2d 185 (1952).

In his brief, appellant alleges none of these grounds but suggests that he might have been incompetent to enter a plea of guilty. Even assuming that incompetence is sufficient grounds to allow a withdrawal of a plea, as it might affect whether the plea was voluntarily and intelligently made, appellant neither alleges that he was incompetent nor does he make a factual showing, which if believed, would allow the court to make such a finding. Appellant's factual allegations, which are set forth in his motion, merely show him to have been something of a disciplinary problem as a child. He shows no abnormal behavior nor past history of psychiatric treatment. Compare *Leach v. United States*, No. 18,198, decided April 9, 1964 (involving a psychiatric examination prior to sentencing). Moreover, the District Court noted that it had an ample opportunity to observe appellant while he testified in the trial of the co-defendants. The court thus found no "sufficient showing" to warrant a mental examination (Tr. 22). Appellant's burden is even greater to allow the withdrawal of his plea of guilty. *United States v. Holland*, *supra*, is instructive in that an almost identical situation resulted in a similar decision by the District Court.

Further, even assuming that a sufficient showing for a mental examination were made, no authority is cited which would even allow the trial court to have jurisdiction to order a mental examination after sentencing.³ Cf. 24 D.C.C. § 101, § 106, 24 D.C.C. § 301, *Leach v. United States*, *supra*; *Jones v. United States*, — U.S. App. D.C. —, 327 F.2d 867 (1963).

Treating the motion for a mental examination as arising under 28 U.S.C. § 2255, still does not entitle appellant to a hearing as to his competency at the time the plea was entered. The mental competency of the accused to enter a plea of guilty is available as a ground for collateral attack under § 2255. *United States v. McNicholas*, 298 F.2d 914 (4th Cir. 1962), *cert. denied*, 369 U.S. 878; *Pledger v. United States*, 272 F.2d 69 (4th Cir. 1959). Appellant here does not assert that he was incompetent at the time of the plea. Rather, he requests a mental examination to inquire into that area based on the following factual allegations: 1) that he has been "brooding" since sentencing—not an unusual reaction to term of imprisonment, and 2) that he was a disciplinary problem as a child and engaged in fights and thievery. Allegations of his treatment at the hands of others is described by his own counsel as "false or imagined (Br. 3)." Appellant alleges no past history of psychiatric treatment. His trial counsel did not suggest that appellant was in any way unable to assist in his own defense when the plea was entered. Further, the District Court had ample opportunity to observe appellant when he testified during the trial of the co-defendants.

Thus, appellant's allegations, if believed, raise no issue as to his competency at the time the plea was entered. The court, on this motion, could properly find that on the existing record appellant was conclusively not entitled to relief. See, *Bishop v. United States*, 350 U.S. 961 (1956),

³ At the hearing appellant, through counsel, coupled his request for a mental examination solely with the motion for reduction in sentence, under Rule 35, Fed. R. Crim. P., not with the motion to withdraw the plea. Inasmuch as the motion for reduction in sentence was not timely filed, it was denied by the District Court and is not raised now on appeal.

reversing 96 U.S. App. D.C. 117, 223 F.2d 582; Bostic v. United States, 112 U.S. App. D.C. 17, 298 F.2d 678 (1961); Nelms v. United States, 318 F.2d 150 (4th Cir. 1963).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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